

(1964) 11 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 193 of 1963

Sayaji Mills Ltd.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 30-11-1964

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 11, 11(2), 31, 33, 35

Citation : (1966) 18 STC 287

Hon'ble Judges : P.N. Bhagwati, J;J.M. Shelat, J

Bench : Division Bench

Advocate : M. Nanavati, for the Appellant; B. R. Sompura, Assistant Government Pleader and M.G. Doshit, Additional Government Pleader, for the Respondent

Judgement

Bhagwati, J.—Though there are three questions raised in this petition, the main question that we are called upon to consider is whether a certain order made by the Commissioner of Sales Tax imposing sales tax on the petitioners in respect of certain sales of machinery effected by the petitioners discloses an error of law apparent on the face of the record. In order to understand how the question arises and to be able to arrive at a proper determination of it, it is necessary to state briefly a few facts giving rise to the petition. The facts are as follows :-

The petitioners at all material times carried on business of manufacturing and selling cotton textile goods and were registered as such under the Bombay Sales Tax Act, 1953. In or about 1955 the petitioners imported under actual user's licence a mercerizing plant from Switzerland at the cost of Rs. 3,32,000 and two doubling plants from the United Kingdom, one at the cost of Rs. 83,558 and the other at the cost of Rs. 63,976. The petitioners also purchased from Bombay at about the same time a cooling plant at the cost of Rs. 24,375. The doubling plants and the cooling plant were to be installed along with the mercerizing plant, but after import it was found that the mercerizing plant was not suitable for the requirement of the petitioners and the petitioners, therefore, sold off the

mercerizing plant and along with the mercerizing plant also the doubling plants and the cooling plant to Rohit Mills Limited, a sister concern, under five different bills bearing dates between 16th October, 1955, and 25th December, 1955. The aggregate price realised by the petitioners was Rs. 4,82,740 as against the total cost of Rs. 5,03,909, incurred by the petitioners and the petitioners thus incurred a loss of about Rs. 21,000. In the assessment of the petitioners to sales tax for the assessment period 1st April, 1955, to 4th March, 1956, the Sales Tax Officer included the price received by the petitioners on these sales in the turnover of the petitioners and assessed these sales to tax under the provisions of the Act. The petitioners preferred an appeal against the order of the Sales Tax Officer to the Assistant Commissioner of Sales Tax. The petitioners contended before the Assistant Commissioner of Sales Tax that the sales in question were casual sales not amounting to business and were, therefore, not chargeable to tax. This contention was accepted by the Assistant Commissioner of Sales Tax who taking the view that the sales were casual sales not constituting business activity of the petitioners, held that the sales were not chargeable to tax and excluded the sum of Rs. 4,82,740 representing the price received by the petitioners on the sales from the turnover of the petitioners. This order was made by the Assistant Commissioner of Sales Tax on 24th August, 1960. Before this order was passed by him, the Bombay Sales Tax Act, 1959, had already come into force and by section 76 of that Act the Bombay Sales Tax Act, 1953, was repealed. Section 77 of the Bombay Sales Tax Act, 1959, however, enacted a saving provision and prior to its amendment it was in the following terms :-

"77. (1) Notwithstanding the repeal by section 76 of any of the laws referred to therein, -

(a) those laws (including any earlier law continued in force under any provisions thereof), and all rules, regulations, orders, notifications, forms and notices issued under those laws and in force immediately before the appointed day shall, subject to the provisions of sections 35 and 42, continue to have effect for the purposes of the levy, assessment, reassessment, collection, refund or set-off of any tax, or the granting of a drawback in respect thereof, or the imposition of any penalty, which levy, assessment, reassessment, collection, refund, set-off, drawback or penalty relates to any period before the appointed day, or for any other purpose whatsoever connected with or incidental to any of the purposes aforesaid; * * *

2. The operation of the Bombay Sales Tax Act, 1953, in regard to levy, assessment, reassessment, collection, refund or set-off of any tax or granting of any drawback or imposition of any penalty in respect of the period prior to the coming into force of the Bombay Sales Tax Act, 1959, was thus saved by section 77 notwithstanding the repeal of the Bombay Sales Tax Act, 1953, but the saving was subject to the provision of section 35 which ran as follows :-

"35. (1) If the Commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods chargeable to tax under this Act or any

earlier law, has in respect of any year escaped assessment, or has been under-assessed or assessed at a lower rate, or that any deductions have been wrongly made, then the Commissioner may, -

(a)

(b) where he has reason to believe that the dealer has concealed such sales or purchases or any material particular relating thereto, or has knowingly furnished incorrect returns, at any time within eight years, and

(c) in any other case, at any time within five years,

of the end of that year, serve on the dealer liable to pay tax in respect of such turnover, a notice containing all or any of the requisitions which may be included in a notice under sub-section (3) of section 33 and may proceed to assess or reassess the amount of the tax due from such dealer; and accordingly, the other provisions of this Act shall apply as if the notice were a notice served under that sub-section :"

3. It would be seen that section 35 empowered the Commissioner to assess or reassess the amount of tax due from a dealer where it was found that the turnover of the dealer had escaped assessment or had been under-assessed or assessed at a lower rate or any deductions had been wrongly made, but the proceedings for such assessment or reassessment were required to be initiated by the Commissioner within a certain period of limitation, which varied according to the circumstances necessitating such assessment or reassessment. This was the state of the law when the Commissioner of Sales Tax issued a notice calling upon the petitioners to show cause why the order of the Assistant Commissioner of Sales Tax should not be revised and the price realised by the petitioners on the sales of machinery effected by them should not be included in the turnover of the petitioners. The petitioners appeared to show cause but the Commissioner of Sales Tax was not satisfied and he passed an order dated 7th September, 1961, setting aside the order of the Assistant Commissioner of Sales Tax and directing the petitioners to pay a sum of Rs. 7,542.81 nP. as sales tax on the sales of machinery effected by the petitioners. The view taken by the Commissioner of Sales Tax was that these sales were not casual sales but were sales in the course of business and the test he applied for the purpose of reaching this conclusion was the test of volume and frequency formulated by the Tribunal in the case of Ambica Mills Limited which had been decided by the Tribunal prior to that date and which then held the field. The Commissioner of Sales Tax also relied on the fact that while effecting the sales the petitioners had collected from the purchaser amounts by way of sales tax and had also taken from the purchaser certificates in "L" Form in respect of general sales tax. This circumstance in the opinion of the Commissioner of Sales Tax clearly showed that the petitioners themselves regarded these sales as business sales reflecting business activity of the petitioners and these sales were, therefore, liable to be included in the turnover of the petitioners as sales chargeable to tax. The Commissioner of Sales

Tax accordingly revised the order of the Assistant Commissioner of Sales Tax as set out hereinabove and directed the Sales Tax Officer to issue a demand notice requiring the petitioners to pay up the sum of Rs. 7,542.81 nP. as sales tax on these sales. This order was made by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953.

4. Being aggrieved by this order the petitioners preferred an appeal to the Tribunal. Before the Tribunal a contention of a preliminary nature was raised on behalf of the petitioners. The contention was that since the saving of the operation of the provisions of the Bombay Sales Tax Act, 1953, u/s 77 of the Bombay Sales Tax Act, 1959, was subject to section 35 of the Bombay Sales Tax Act, 1959, wherever a case relating to any period prior to the coming into force of the Bombay Sales Tax Act, 1959, was covered by section 35 of the Bombay Sales Tax Act, 1959, action in relation to such case could be taken only under that provision and not under any provision of the Bombay Sales Tax Act, 1953, and the present case being a case of that nature, the proceedings taken by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953, were misconceived. This contention was accepted by the Tribunal and the Tribunal held that "..... after the coming into force of the Act of 1959 it is obligatory on the Commissioner to act u/s 35 if he wishes to assess or reassess a dealer's turnover under the circumstances mentioned in section 35, even where the turnover escaping assessment etc., is in respect of the period prior to the commencement of the Act of 1959, within the prescribed period of limitation and it is not open to him whatever the position might be under the Act of 1953, to proceed u/s 31 in respect of matters covered by section 35 to the prejudice of the dealer." The Tribunal observed that what the Commissioner of Sales Tax proposed to do when he initiated proceedings u/s 31 of the Bombay Sales Tax Act, 1953, was covered by section 35 of the Bombay Sales Tax Act, 1959, and on the view of the construction of the provisions of section 77 taken by it the Tribunal held that the proceedings taken by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953, were misconceived. The Tribunal observed that even if the proceedings were deemed to have been taken u/s 35 of the Bombay Sales Tax Act, 1959, the order of the Commissioner of Sales Tax still could not be sustained inasmuch as the proceedings were initiated by the Commissioner of Sales tax beyond the period of five years from the end of the assessment period which was the period of limitation applicable to the case. In this view of the matter the Tribunal did not go into the merits of the question whether the sales were casual sales or were sales constituting part of the business of the petitioners. The Tribunal accordingly set aside the order of the Commissioner of Sales Tax and directed that if tax was paid by the petitioners pursuant to the order of the Commissioner of Sales Tax, it should be refunded to the petitioners. The State was dissatisfied with this order of the Tribunal and it accordingly made an application to the Tribunal for a reference of the question of law arising from the order of the Tribunal.

5. The order of the Tribunal was made on 13th March, 1962, at a time when

sections 35 and 77 of the Bombay Sales Tax Act, 1959, were in their unamended form. But on 12th August, 1962, the Gujarat Legislature passed an Amending Act called the Bombay Sales Tax (Gujarat Amendment) Act, 1962, which by section 11 amended sections 35 and 77 of the Bombay Sales Tax Act, 1959. That section was in the following terms :-

"11. Amendment of sections 35 and 77 of Bom. 51 of 1959 and validating provisions. - (1) In section 35 of the principal Act, in sub-section (1), the following shall be, and shall be deemed always to have been, deleted, namely :-

(i) the words "or any earlier law";

(ii) clause (a);

(iii) in the first proviso, the words "or as the case may be, any earlier law";

(iv) in the second proviso, the words "or the relevant earlier law" :

6. Provided that any notice issued, or any proceedings commenced, or continued or completed under the provisions of section 35 of the Bombay Sales Tax Act, 1959, before the commencement of the Bombay Sales Tax (Gujarat Amendment) Act, 1962 (Guj. 25 of 1962), in respect of any turnover of sales or turnover of purchases of any goods chargeable to tax under any earlier law shall be valid and effectual as if issued, commenced, continued or completed under the earlier law applicable thereto, and no such notice or proceedings and no assessment, reassessment, collection, refund, set-off, drawback or penalty made, given, granted or imposed thereunder shall be called in question in any court or tribunal or before any authority on the ground that the notices should have been issued or the proceedings should have been commenced or continued or completed within the period of limitation prescribed in the section 35 and not under the provisions of the relevant earlier law.

(2) In section 77 of the principal Act, in clause (a) of sub-section (1), for the words and figures "of sections 35 and 42" the words and figures "of section 42" shall be, and shall be deemed always to have been, substituted;

and accordingly, notwithstanding anything in any judgment, decree or order of a court or order of a tribunal, any proceedings commenced or continued (including any notice issued) or completed under the provisions of any earlier law, shall be valid and effectual, and no such proceedings and no assessment, reassessment, collection, refund or set-off, drawback or penalty made, given, granted or imposed shall be called in question in any court or tribunal, or before any authority, on the ground only that the proceedings should have been commenced or continued or completed or any notice should have been issued u/s 35 of the Bombay Sales Tax Act, 1959 (Bom. 51 of 1959) and within the period of limitation therein prescribed, and not under the provisions of any earlier law, in respect of any sales or purchases of any goods made before the 1st day of January, 1960."

7. Presumably on the view that by reason of this section enacted by the Amending Act the order of the Commissioner of Sales Tax was revived as valid and effectual notwithstanding the order of the Tribunal setting it aside, the State withdrew its application for reference which was pending before the Tribunal. The revenue authorities also on the same view declined to refund to the petitioners the tax paid by the petitioners in pursuance of the order of the Commissioner of Sales Tax though they were directed to do so by the order of the Tribunal. The petitioners thereupon preferred the present petition under Article 226 of the Constitution praying for issue of a writ of mandamus or other appropriate writ requiring the State and the Sales Tax Officer who were joined as respondents Nos. 1 and 4 to give effect to the order of the Tribunal and to refund the tax paid by the petitioners. The petitioners also claimed in the alternative that a writ of certiorari be issued quashing and setting aside the order of the Commissioner of Sales Tax on the ground that it disclosed an error of law apparent on the face of the record. There was also another relief claimed by the petitioners in the further alternative and that relief was that in any event the order of the Tribunal be quashed and set aside by issuance of a writ of certiorari inasmuch as it proceeded upon an error of law. On the petition being admitted a rule was issued and in opposition to the rule, and affidavit was filed by the Sales Tax Officer on behalf of the respondents. It may be pointed out here that in addition to the State and the Sales Tax Officer who were respondents Nos. 1 and 4, the members of the Tribunal were joined as respondent No. 2 and the Commissioner of Sales Tax was joined as respondent No. 3, inasmuch as the alternative reliefs were directed against them.

8. When the hearing of the petition commenced, Mr. I. M. Nanavati, learned Advocate appearing on behalf of the petitioners, urged three contentions in support of the petition. They were as follows :-

(1) Having regard to the order of the Tribunal setting aside the order of the Commissioner of Sales Tax and directing refund of the tax paid by the petitioners, respondents Nos. 1, 3 and 4 were under an obligation to refund to the petitioners the tax paid by the petitioners pursuant to the order of the Commissioner of Sales Tax and inasmuch as respondents Nos. 1, 3 and 4 had failed to carry out this obligation, the petitioners were entitled to a writ of mandamus or other appropriate writ requiring them to do so. On a true construction of section 11(2) of the Amending Act, the order of the Commissioner of Sales Tax was not revived by the provision enacted in that section inasmuch as that section operated only in respect of those proceedings initiated u/s 31 of the Bombay Sales Tax Act, 1953, which were pending at the date of the coming into force of the Amending Act or which had ended in the making of an order against the assessee. Where, as in the present case, the proceedings commenced u/s 31 of the Bombay Sales Tax Act, 1953, had terminated in favour of the assessee at the date when the Amending Act came into force, the section did not operate to revive an order which had been made at an earlier stage of the proceedings against the assessee but which had been

quashed and set aside before the coming into force of the Amending Act. Since in the present case the proceedings taken by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953, were set aside by the Tribunal before the Amending Act came into force, there were no proceedings which could be rendered valid and effectual under the section and the revenue was, therefore, not entitled to rely on the section for the purpose of contending that, notwithstanding the order of the Tribunal, the order of the Commissioner of Sales Tax was valid and effectual and the petitioners were therefore not entitled to refund of the tax paid by them.

(2) Even if the construction of section 11(2) of the Amending Act suggested on behalf of the petitioners was not well-founded and the order of the Commissioner of Sales Tax was rendered valid and effectual by reason of the provision enacted in the section, the petitioners were entitled to challenge the validity of the order of the Commissioner of Sales Tax inasmuch as that order disclosed an error of law apparent on the face of the record. The Commissioner of Sales Tax had applied wrong tests and omitted to take into consideration relevant tests for the purpose of determining whether the sales in question were casual sales or were part of the business activity of the petitioners. If the correct tests were applied as laid down by us in *Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another*, it would be impossible to hold that the sales were in course of business so as to be chargeable to tax and the only conclusion to which one would inevitably come would be that the sales were casual sales not attracting the charge of tax.

(3) Even if the order of the Commissioner of Sales Tax could not be successfully challenged on the ground that it disclosed an error of law apparent on the face of the record, the petitioners were yet entitled to impugn the validity of the order of the Tribunal. The Tribunal held that the proceedings taken by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953, were misconceived since in its opinion, by reason of sections 35 and 77 of the Bombay Sales Tax Act, 1959, the proceedings could, if at all, be taken only under the provisions of section 35 of the Bombay Sales Tax Act, 1959. Now that undoubtedly was the position according to sections 35 and 77 of the Bombay Sales Tax Act, 1959, as they stood prior to their amendment but as a result of the amendment, the overriding effect of section 35 of the Bombay Sales Tax Act, 1959, was done away with and the Commissioner of Sales Tax was entitled to take proceedings u/s 31 of the Bombay Sales Tax Act, 1953, in regard to any period prior to the commencement of the Bombay Sales Tax Act, 1959. This amendment was expressly made retrospective and the law as embodied in the amended sections 35 and 77 of the Bombay Sales Tax Act, 1959, was deemed always to have been the law with the result that at the date when the Tribunal made its order, the law was not what the Tribunal applied but was as embodied in the amended sections 35 and 77 of the Bombay Sales Tax Act, 1959. The Tribunal was, therefore, clearly in error in holding that the proceedings taken by the Commissioner of Sales Tax u/s 31 of the Bombay Sales Tax Act, 1953, were misconceived and this

constituted an error of law apparent on the face of the record which could be corrected by the Court by issuing a writ of certiorari. Though all these three contentions were formulated by Mr. I. M. Nanavati when he opened the case on behalf of the petitioner, after the hearing had proceeded for some time, he stated that he did not wish to press the first contention. In view of this statement made by him on behalf of the petitioners, it is not necessary for us to consider the validity of the first contention. That would leave for consideration the second and the third contentions but since we are of the view that the second contention is well-founded, it is not necessary for us to go into the question arising on the third contention, though as we shall presently point out Mr. B. R. Sompura, learned Assistant Government Pleader appearing on behalf of the revenue did contend before us that the relief as claimed by the petitioners under the third contention should be granted and not the relief as claimed under the second contention.

9. Turning now to the second contention the question which we have to consider is whether the order of the Commissioner of Sales Tax suffers from an error of law apparent on the record. Now when we examine the order of the Commissioner of Sales Tax we find that he applied two tests for the purpose of reaching the conclusion that the sales in question were part of the business activity of the petitioners and were not casual sales. The first test which he applied was the test of volume and frequency and applying that test he held that not only was the volume of the sales in terms of money large but the frequency was also sufficiently great inasmuch as there were in all five sales and having regard to the fact that the test of volume and frequency was thus satisfied, he came to the conclusion that the sales were in the course of business and were part of the business activity of the petitioners. Another test which he applied was based on the circumstance that the petitioners had collected from the purchaser amounts by way of sales tax and had also taken from the purchasers certificates in "L" Form in respect of general sales tax and this circumstance, in his opinion, clearly showed that the petitioners themselves regarded these sales as constituting business activity of the petitioners. It was contended on behalf of the petitioners that inasmuch as the items of machinery sold by the petitioners were imported on actual user's licence, there could be no intention to resell the same and the profit-motive was, therefore, clearly absent which was essential in order to constitute the sales a business. This contention was answered by the Commissioner of Sales Tax by saying that though it was undoubtedly true that the items of machinery were imported against actual user's licence, it was surprising that the petitioners were able to decide upon the suitability of the items of machinery without even installing them. The Commissioner of Sales Tax found it impossible to believe that the petitioners could decide upon the suitability of the items of machinery without even installing them and from that fact alone he concluded that the items of machinery could not have been found to be unsuitable for the requirements of the petitioners and it was, therefore, not correct to say that they were sold because they were not found suitable. This

was broadly the reasoning of the Commissioner of Sales Tax in coming to the conclusion that the sales were not casual sales but were part of the business activity of the petitioners and were, therefore, chargeable to tax.

10. Taking up first the test of volume and frequency applied by the Commissioner of Sales Tax we find that that test was applied by him in view of the decision of the Tribunal in the case of Ambica Mills Limited which then held the field. That case subsequently came before us on a reference and while dealing with that case we had occasion to consider various decisions bearing upon the point and to lay down the correct principles to be applied in the determination of the question as to when sales effected by a dealer can be said to be sales forming part of the business of the dealer. Our decision in that case is reported in Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another, . Several decisions of various High Courts were cited before us in that case and after analysing those decisions, My Lord the Chief Justice, speaking on behalf of the Bench, observed :-

"The analysis made by us of the different decisions of the different High Courts shows that though various tests were applied in those decisions dealing with different circumstances, there is uniformity of opinion that the Sales Tax Acts do not attempt to tax all sales but that they have, compared to the Income Tax Act, a narrower and a restricted field. The sales which are amenable to tax under the Sales Tax Acts are not all sales, but those sales which can be said to have been effected as part of the business of the assessee or in the course of business activity. Where an assessee who is a registered dealer or one who is liable to be registered, has effected sales which are incidental to his normal business or sales of subsidiary products or bye-products arising out of his normal business, such sales would be considered as having been made in the course of his business. The word "business" having a wide connotation, spreading over a vast and an indefinite field of activity, the Courts have to apply different tests to different types of sales involving a variety of articles or goods in order to ascertain whether they fall under the category of sales effected in the course of business. In the nature of things, therefore, it would be impossible to lay down a hard and fast rule which would uniformly or in a symmetry govern all cases. Therefore, though different tests governing different sets of circumstances have been laid down, such as volume and degree of frequency, continuity and regularity of transactions, the nature of the goods sold, the initial intention at the time of their manufacture or purchase etc., each test so laid down must be taken as governing the facts to which it was applied, and at best, is an indication which however would be liable to be offset by other circumstances existing in a given case."

11. In these observations we pointed out that the test of volume and frequency was only one of many different tests which might in a given set of circumstances help in the determination of the question but it could not be elevated to the position of a conclusive or determinative test applicable in all circumstances. As a matter of fact in that very case as many as sixteen sales of different items of machinery had been effected by Ambica Mills Limited and the items of machinery

included 89 looms, 28 carding engines, two lathes and some other small machines. Out of sixteen sales, in twelve of them, Ambica Mills Limited had collected amounts by way of sales tax from the purchasers and the purchasers were all different persons and the different vouchers had been made out in respect of the sales effected to them. The facts in that case were, therefore, very much stronger than the facts in the present case from the point of view of the revenue, but even so, we held that the sales were casual sales and were not part of the business of Ambica Mills Limited. We pointed out that the test of volume and frequency was not a decisive test and that what was of the crux was the fact that the sales were realisations of the assets of the mill effected in pursuance of a phased programme for installation of modern plant and machinery and were not in pursuance of a design or scheme for profit-making. We emphasised the fact that profit-motive was essential to a business activity and inasmuch as the initial or original intention at the time of purchase of the items of machinery was not to sell them but to make use of them for the purpose of making goods and the reason why they were sold was because they were no longer required by Ambica Mills Limited, their sales could not be regarded as having been made with a profit-motive and, therefore, did not constitute business activity of the petitioners. Dealing with this aspect of the matter, My Lord the Chief Justice, observed :-

"... In our view, a sale of an asset, such as old machinery, cannot be regarded as one made with a profit-motive or as one made in the course of business of a dealer. In such a case, the initial or the original intention when its purchase was made to use it for making the goods, would remain unless circumstances are established which would offset the presumption that the intention was to use it for making goods rather than to sell it at profit at some future date. When such an asset is sold, it cannot therefore be said to have been sold with a profit-motive."

12. Later in the course of the judgment the conclusion was summarized in the following words :

"In our view, the test of volume and degree of frequency in the present case cannot be treated as a determinative factor, nor is it possible to hold that sales were made with any profit-motive. The fact that sales tax was charged and collected by the mills from their purchasers also cannot be held to be conclusive. Even the learned Advocate-General conceded that that fact was only an indication that the mills themselves regarded the sales as having been effected in the course of business. It is possible, however, that the mills might have charged and collected sales tax either as and by way of abundant caution or through a mistaken belief that the sales would be liable to tax. In either event, it cannot be said to amount to estoppel or an intention clearly indicative of their having made these sales in the course of business, or their having treated them as a business activity."

13. These latter observations also answer the second point made by the

Commissioner of Sales Tax, namely, that the fact that the petitioners collected from the purchaser amounts by way of sales tax and also took from the purchaser certificates in "L" Form in respect of general sales tax, showed that the petitioners themselves regarded the sales as constituting part of their business. As pointed out in these observations, this circumstance does not have any relevance in deciding whether the sales were casual sales or were sales effected in the course of business. It is quite possible that the petitioners collected the amounts by way of sales tax and took certificates in "L" Form in respect of general sales tax from the purchaser by way of abundant caution or under a mistaken belief that they would be liable to pay tax, but that cannot alter the true state of affairs which must be determined on an appreciation of the facts as they exist. It would thus be seen that though the test of volume and frequency applied by the Commissioner of Sales Tax was undoubtedly a relevant test, the Commissioner of Sales Tax was clearly in error in applying it as if it were a decisive test and so far as the second test based on the collection of amounts by way of sales tax and obtaining of certificates in "L" Form from the purchaser is concerned, that was no test at all and the Commissioner of Sales Tax fell into an error of law in giving importance to that test and applying it in the determination of the present question.

14. Mr. B. R. Sompura on behalf of the revenue drew our attention to a decision of the Supreme Court in *The State of Andhra Pradesh v. Abdul Bakshi & Bros.* ([1964] 15 S.T.C. 644(AP), and contended that this decision which was given by the Supreme Court subsequent to our decision in *Ambica Mills Case* ([1964] 15 S.T.C. 367(SC) has taken a view different from that taken by us in *Ambica Mills case* ([1964] 15 S.T.C. 367(SC) and having regard to this decision, what we have said about in *Ambica Mills Ltd. and Others Vs. The State of Gujarat and Another*, can no longer be regarded as good law. This decision of the Supreme Court was given in an appeal from a decision of the Andhra Pradesh High Court. The question which arose was whether a dealer who carried on business of tanning hides and skins and selling tanned skins could be said to be carrying on the business of buying tanning bark required for the purpose of carrying on the business of tanning. The argument on behalf of the assessee which found favour with the Andhra Pradesh High Court was that a purchaser was liable to pay tax under the relevant rules framed under the Hyderabad General Sales Tax Act, 1950, only when he was carrying on business of buying and selling a commodity specified in the relevant rules and not when he bought it for consumption for manufacturing an article to be sold by him. According to this argument, if a dealer buys any commodity for consumption in his business and not for sale, he would not be regarded as engaged in the business of buying that commodity and the price paid for buying that commodity would not be liable to tax. This argument was, however, negatived by the Supreme Court and Shah, J., delivering the judgment of the Supreme Court made the following observations which are strongly relied on on behalf of the revenue :-

"... A person to be a dealer must be engaged in the business of buying or selling

or supplying goods. The expression "business" though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit-motive, and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying, selling and supplying the same commodity. Mere buying for personal consumption, i.e., without a profit-motive, will not make a person dealer within the meaning of the Act, but a person who consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale, would be regarded as a dealer. The Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer : the definition merely requires that the buying of the commodity mentioned in rule 5(2) must be in the course of business, i.e., must be for sale or use with a view to make profit out of the integrated activity of buying and disposal. The commodity may itself be converted into another salable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such salable commodity."

15. Now it is difficult to see how these observations help the case of the revenue. In the first instance it must be remembered that the question before the Supreme Court was as to when a person can be said to be carrying on the business of buying goods. Is it necessary that he should be buying goods for the purpose of using them for making other goods for the purpose of sale ? The Supreme Court answered by saying that it is not necessary in such a case that a person should buy goods for the purpose of selling them. Even if he buys goods for using them in manufacturing other goods for sale, he would still be a dealer carrying on the business of buying goods if the integrated activity of buying and disposal was pursued with the object of making profit. It was profit-motive which imported the character of business to an activity. To use the words of the Supreme Court "to regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit-motive ..." This is exactly what we said in *Ambica Mills case* ([1964] 15 S.T.C. 367(Guj)). Since in the case before the Supreme Court the activity of buying tanning bark was carried on by the assessee with the object of making profit by using tanning bark for the purpose of tanning hides and skins and selling them in the market, the Supreme Court took the view that the assessee was carrying on the business of buying tanning bark. Mr. B. R. Sompura relied very strongly on the words at the end of the passage quoted above, namely, "the commodity may itself be converted into another salable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such salable commodity." But these words must be read in the context of the facts of the case and the observations which precede them and so read, they cannot be construed to mean that even where an assessee purchases items of machinery to be used in aid of a manufacturing process, the assessee would be said to be

carrying on business of buying machinery. Such a construction would lead to this absurdity that every manufacturer would be a dealer carrying on business of buying machinery. It must be remembered that the case before the Supreme Court was a case where tanning barks in the nature of raw materials were being bought by the assessee and it was in the context of those facts that these words were used by the Supreme Court. Here we have a case where items of machinery which are in the nature of capital assets were purchased by the petitioners and subsequently sold and again the question is not whether the petitioners carried on the business of buying those items of machinery but whether they carried on the business of selling those items of machinery. This decision of the Supreme Court does not, therefore, in our opinion throw any doubt on what we have said in Ambica Mills case ([1964] 15 S.T.C. 367(SC)). On the contrary it reinforces the view we have taken in that case.

16. Turning back to the facts of the case, let us apply the test set out above, namely, whether there was any profit-motive in the sales of machinery effected by the assessee. Before we apply this test we may point out that even the test of volume and frequency of sales cannot yield a decision in favour of the revenue. There is nothing to show what were the total sales of textile goods effected by the petitioners in the assessment year in question. Equally there is nothing to show what was the total value of the machinery owned by the petitioners. Only five sales were effected and those were also within a short period of about two months and were of machinery connected with the mercerizing plant. It would, therefore, be impossible to say even by applying the test of volume and frequency that the sales effected were of such a character that an inference must necessarily follow that they were effected as part of business activity. But as we pointed out above, the principal test which must be applied is the test of profit-motive. It is here that the case of the revenue falls to the ground. The items of machinery sold by the petitioners were purchased against actual user's licence and it is, therefore, clear that they were purchased for actual use by the petitioners. There was no intention on the part of the petitioners to sell these items of machinery at the date when they were purchased by the petitioners. It was only after the items of machinery were received by the petitioners that the petitioners found the mercerizing plant unsuitable for their requirements and, therefore, they decided to sell it along with the other connected items of machinery to their sister concern Rohit Mills Limited. Of course the Commissioner of Sales Tax came to the conclusion that it could not be said to have been established that the petitioners sold off these items of machinery because they were not suitable for their requirements. But this conclusion was based on a process of reasoning which we must regard as wholly erroneous and impermissible. What the Commissioner of Sales Tax thought was that the items of machinery could not have been found to be unsuitable for the requirements of the petitioners inasmuch as it was impossible for the petitioners to have found them to be unsuitable before installing them and it was common ground between the parties that the items of machinery were not installed by the petitioners

before they were sold to Rohit Mills Limited. But this premise itself is in our opinion incorrect and there is no basis for it. One does not have to install a machine in order to be able to find out that it is unsuitable for one's requirements. Now apart from this ground the Commissioner of Sales Tax had no reason to disbelieve the statement of the petitioners that they sold off the items of machinery to Rohit Mills Limited because the items of machinery were not suitable for their requirements and as a matter of fact this statement receives considerable support from the fact that they sold off the items of machinery at a loss of about Rs. 21,000 which one can reasonably assume no prudent owner would do unless the items of machinery were not required by him or were unsuitable for his requirements. It is, therefore, clear that the items of machinery were sold by the petitioners not with any profit-motive but because they were not suitable for the requirements of the petitioners. Moreover it must be remembered that the items of machinery were capital assets of the petitioners and unless the revenue can show that they were at some stage turned into stock-in-trade, their sales would not be liable to be regarded as forming part of the business of the petitioners. This the revenue has not been able to do and we are, therefore, of the opinion that the Commissioner of Sales Tax clearly committed an error of law apparent on the record in taking the view that the sales were not casual sales but were sales forming part of the business activity of the petitioners. In that view of the matter the order of the Commissioner of Sales Tax would have to be quashed and set aside by issue of a writ of certiorari.

17. Mr. B. R. Sompura on behalf of the revenue strenuously contended before us that we should not quash and set aside the order of the Commissioner of Sales Tax but we should instead remand the matter to the Tribunal for the determination of the question as regards the true nature of the sales on merits. But we do not see how we can possibly accede to the request of Mr. B. R. Sompura. We have no power of remand of the nature suggested by him. It is undoubtedly true that the Tribunal disposed of the appeal before it on the preliminary question whether the proceedings taken by the Commissioner of Sales Tax were valid or not and did not examine the question as regards the true nature of the sales on merits, but the appeal having already been disposed of, we cannot ask the Tribunal to reopen the appeal or to rehear it on merits unless the decision of the Tribunal on the preliminary question is set aside which the petitioners obviously do not want except as a last alternative. The only ground on which Mr. B. R. Sompura could ask us not to interfere with the order of the Commissioner of Sales Tax was that the petitioners had an alternative remedy but even that ground was not available to him because alternative remedy was already exhausted by the petitioners and he rightly did not urge that ground before us. We cannot, therefore, send the matter back to the Tribunal as contended on behalf of the revenue.

18. In this view of the matter a writ of certiorari must issue quashing and setting aside the order of the Commissioner of Sales Tax. The petitioners will get the

costs of the petition from the State.

19. Petition allowed.